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In The

SUPREME COURT OF THE UNITED STATES

October Term 1993

TORWICO ELECTRONICS, INC., *Petitioner*
v.
STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit

BRIEF OF KATHRYN R. HEIDT *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Party Supported: Petitioner

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34 pp

QUESTION PRESENTED

Should the lower courts, in analyzing the dischargeability in bankruptcy of environmental cleanup obligations, be required to follow the analytic framework of the Bankruptcy Code and thereby strictly separate the questions of whether an obligation is a "claim" from the question of when the obligation "arose?"

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATUTES INVOLVED 2

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING CERTIORARI 5

I. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON HOW TO ANALYZE THE DISCHARGEABILITY OF AN ENVIRONMENTAL CLEANUP OBLIGATION IN BANKRUPTCY 5

A. Whether an obligation is dischargeable in bankruptcy depends on two issues: 1) whether the obligation is a "claim" and 2) when it "arose," two issues that are often confused by the courts of appeals, including the court below, in determining the dischargeability of an environmental cleanup obligation. 7

B. The cleanup obligation in this case was a "claim" because of 1) the plain meaning of

the definition and 2) this Court's decision in *Ohio v. Kovacs*. 14

1. The State had a right to payment. 14
2. The obligation was a "claim" under this Court's decision in *Ohio v. Kovacs* 16
3. The court incorrectly applied cases involving the timing issue to decide this definitional issue. 18

C. The effect of the decision below was to ignore the real parties in interest. 19

D. The decision of the court of appeals is inconsistent with established, fundamental bankruptcy policies. 19

1. Efficiency and fairness are fundamental bankruptcy principles on which are based the bankruptcy policies of 1) the fresh start and 2) treating similar creditors equally are based. 19
2. The Decision of the Court of Appeals Violates Both Principles of Bankruptcy Policy 22

SUMMARY 24

CONCLUSION 24

TABLE OF AUTHORITIES

Statutes

11 U.S.C. § 507(a)(3) and (7) 3, 23

11 U.S.C. § 101(5) 2, 8, 12

11 U.S.C. § 1141(d) 3, 7, 20

11 U.S.C. § 523(a) 3, 22

11 U.S.C. § 726(b) 3, 20

11 U.S.C. § 727(a)(1) 20, 22

11 U.S.C. § 727(b) 2, 7

11 U.S.C.§ 101(12) 2, 7

42 U.S.C. 9607 12

Cases

Jensen, In re, 127 B.R. 27 (9th B.A.P. 1991) 8, 9

Chateaugay Corp. In re, 944 F.2d 997 (2d Cir. 1991) . . 10-13, 16, 18

CMC Heartland Partners v. Union Pacific Railroad, 3 F.2d 200 (7th Cir. 1993) 8, 9

CMC Heartland Partners, 966 F2d 1143 (7th Cir 1992) . . . 11-13, 18

In re Chicago, Milwaukee, St. Paul & Pacific Railroad, 974 F.2d 775 (7th Cir. 1992) 8, 9

Jensen, In re, 995 F.2d 925 (9th Cir. 1993) 8, 9

Local Loan Co. v. Hunt, 282 U.S. 234, (1934) 19, 20

National Gypsum Co., In re, 139 B.R. 392 (N.D. Tex. 1992) 14

Ohio v. Kovacs, 469 U.S. 274 (1985). 14, 16, 17

Pa. Dept. Welfare v. Davenport, 495 U.S. 552 (1990) . . 15

Patterson v. Shumate, 112 S. Ct. 2242 (1992) 15

Rake v. Wade, __ US __, 113 S. Ct. 2187 (1993). 15

Sylvester Bros. Dev. v. Burlington N. RR., In re, 133 B.R. 648 (D. Minn. 1991) 8, 9

Toibb v. Radloff, 111 S. Ct. 2197 (1991) 15

Torwico Electronics, Inc. v. N. J. Dept. Envnt. Prot., 8 F.3d 146 (3rd Cir. 1993) 4

U.S. v. Ron Pair Enterprises, 489 U.S. 235 (1989).. . . . 15

U.S. v. Union Scrap Iron & Metal, 123 B.R. 831 (D. Minn. 1990)). 9, 14

United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988). . 4, 11

Miscellaneous

Heidt, Kathryn R., *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 Florida L. Rev.153 (1992) 10

Heidt, Kathryn R., ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993) 10, 16

Jackson, Thomas H., THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986). 21

Warren, Elizabeth, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775 (1987) 20

INTEREST OF *AMICUS CURIAE*

Kathryn R. Heidt is a law professor at Wayne State University Law School in Detroit, Michigan. She teaches bankruptcy law, corporate reorganizations and commercial law. She has written extensively on the intersection of bankruptcy and environmental law. She is the author of the treatise ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993) as well as several law review articles on the subject. She speaks regularly to judges, practicing lawyers and law professors on the subject. She hopes that she can bring to these proceedings a perspective that is broader and may take into account more interests that those represented by the parties. Those interests and perspectives are more fully set out in the "Motion for Leave to File as *Amicus Curiae* in Support of Certiorari," filed with and attached to this brief at its conclusion. A detailed list of her publications and her speaking engagements are set forth in her *curriculum vitae*, a copy of which is attached to that Motion.

STATUTES INVOLVED

Section 101(5) of the Bankruptcy Code, (11 U.S.C. § 101(5)) provides:

> "claim" means --
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

Section 101(12) of the Bankruptcy Code, (11 U.S.C. § 101(12)) provides:

> "debt" means liability on a claim;

Section 727(a)(1) of the Bankruptcy Code, (11 U.S.C. § 727(a)(1)) provides:

> (a) The court shall grant the debtor a discharge unless --
>
> (1) the debtor is not an individual;

Section 727(b) of the Bankruptcy Code, (11 U.S.C. § 727(b) provides:

> Except as provided in section 523 of this title, a discharge granted under subsection (a) of this section discharges the debtor from all debts that arose before

the date of the order for relief [the date of the petition in a voluntary bankruptcy case] under this chapter, ...

Section 726(b) of the Bankruptcy Code, (11 U.S.C. § 726(b) provides, in part:

> (b) Payment of claims of a kind specified in [specified paragraphs, which include general unsecured claims] shall be made pro rata among claims of the kind specified in each particular paragraph, ...

Section 507(a) of the Bankruptcy Code, (11 U.S.C. § 507(a) provides in part:

> (a) The following expenses and claims have priority in the following order
>
> ...

Section 523(a) of the Bankruptcy Code, (11 U.S.C. § 523(a) provides in part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> (5) [alimony, child support, etc]
>
> (8) [educational loans]

Section 1141(d)(1) of the Bankruptcy Code, (11 U.S.C. § 1141(d)(1) provides:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, ...

SUMMARY OF ARGUMENT

The United States Courts of Appeals are irreconcilably divided on the question of how to analyze and decide the issue of whether an environmental clean up obligation is dischargeable in a bankruptcy proceeding.

The Court of Appeals for the Third Circuit below held that an obligation to clean up a contaminated site not currently owned or operated by the debtor was not a "claim," was not a "debt," and therefore was not dischargeable in bankruptcy. *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3rd Cir. 1993). The decision contravenes important provisions of federal law: 1) it overrides the priority of claims established by Congress in the Bankruptcy Code and 2) it negates the "fresh start" provided for by Congress in the Bankruptcy Code.

There are two "types" of conflicts among the courts of appeals. The first concerns whether an injunction or other order directing the debtor to cleanup, when the debtor is the former occupant of the property, is a "claim" within the meaning of the Bankruptcy Code. It is typified by the decision in the court below. That decision is in direct conflict with a decision of the Court of Appeals for the Sixth Circuit, which decided a case with virtually identical facts. *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988).

The second type of conflict concerns the analytic approach taken by the courts of appeals in attempting to decide the dischargeability of environmental cleanup obligations in bankruptcy. This second type of conflict is also is also typified by the decision below. In this regard, the decision below is in conflict with that of several other courts of appeals. The complexity of issues that arise at the intersection of bankruptcy

and environmental law have resulted in a split among the courts of appeals in how they address, analyze and resolve the matters of environmental obligations in bankruptcy. Due to the many approaches taken by the courts, there is no uniformity of analysis at the intersection of these two important bodies of law. Guidance is needed from this Court on this important federal matter.

Petitioner's Petition addresses the first type of conflict. This brief addresses the second type of conflict in the courts of appeals -- that of the proper way to analyze the dischargeability of environmental obligations in bankruptcy. This brief focuses on the lack of a unified approach among the courts that results in such inconsistent and conflicting results.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON HOW TO ANALYZE THE DISCHARGEABILITY OF AN ENVIRONMENTAL CLEANUP OBLIGATION IN BANKRUPTCY

Although the Bankruptcy Code and the environmental laws regulating hazardous substances were enacted at roughly the same time, they are not well coordinated.[1] As a result there

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1. The Bankruptcy Code went into effect in 1979. At the federal level, the Comprehensive Environmental, Compensation and Recovery Act ("CERCLA" or "Superfund")

is widespread confusion in the courts and a conflict among the courts of appeals regarding how to analyze and decide those issues.

The decision in this case is but one of several that show widespread confusion among the courts regarding the dischargeability of environmental obligations in bankruptcy. The intersection of bankruptcy and environmental law has resulted in a conflict among the courts of appeals in how they address, analyze and resolve these cases. The writ of certiorari should be granted to resolve the conflict and provide much needed guidance to the courts of appeals and lower federal courts.[2]

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was enacted and went into effect in 1980.

2. Although this case involves a corporation that was liquidating, and therefore does not technically need a discharge because it will cease to exist, the scope of the decision is much broader. The decision of the Court of Appeals for the Third Circuit affects all types of debtors and all types of bankruptcy cases. The decision is premised upon incorrect interpretations of the technical term "claim" and "debt" as used in the Bankruptcy Code. The definitions of "debt" and "claim" apply to all cases under the Code and do not depend on whether the debtor is a corporation or an individual, or is liquidating or reorganizing.

A. Whether an obligation is dischargeable in bankruptcy depends on two issues: 1) whether the obligation is a "claim" and 2) when it "arose," two issues that are often confused by the courts of appeals, including the court below, in determining the dischargeability of an environmental cleanup obligation.

While environmental laws place the responsibility to clean up on both current owners and on former owners, it is a fundamental tenet of bankruptcy law that the past is to be separated from the future. Liability based solely on past ownership will not survive bankruptcy. Liability based on being a current owner or operator will, however, arise again and again every day until satisfied. It will survive bankruptcy. In sum, the Bankruptcy Code will discharge obligations that arise solely in the past but not those that continue to arise in the future.

At a technical level, the Bankruptcy Code only discharges "debts" that "arose" before a specified time. 11 U.S.C. §§ 727(b), 1141(d). In a Chapter 11 reorganization an obligation will be discharged if it fits within the Bankruptcy Code definition of "debt" and it "arose" before the plan of reorganization is confirmed by the court. 11 U.S.C. § 1141(d)(1).

The Bankruptcy Code defines a "debt" as a "liability on a claim." 11 U.S.C. § 101(12). Thus, only obligations that are within the definition of "claim" are "debts" and therefore subject to the bankruptcy discharge. The definition of "claim" includes

two sorts of obligations.[3] It includes rights that are legal in nature, i.e., those which are for damages, for money. It also includes rights to equitable remedies *if* the breach of the obligation that gave rise to the remedy also gives rise to a right to payment.

Whether an obligation is dischargeable thus depends on two things, which the courts tend to confuse:

1) whether the obligation is a "debt" within the meaning of the Bankruptcy Code (the "definitional" issue), and

2) whether the obligation "arose" before a certain time (the "timing" issue).[4]

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3. Section 101(5) provides:

"claim" means --

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

4. One additional factor complicates some of the cases: whether the creditor knew or should have known about the obligation. Lack of knowledge that a debtor might be responsible for an environmental obligation gives the courts pause: can a debt be discharged if the creditor (and possibly the

Courts often confuse these two issues.[5] For example, the Court

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debtor) did not even know it existed? Again, there is no uniformity in the analysis applied by the courts. Some courts incorporate the element of notice or knowledge into the definition of "claim," others incorporate it into the timing element, still others use it as an independent basis on whether a discharge can be granted. *See, e.g., In re Jensen*, 995 F.2d 925 (9th Cir. 1993) (claim was discharged since government had sufficient knowledge about it). In *Jensen* the Bankruptcy Appellate Panel had previously held that a claim could exist although all of the elements of the environmental obligation had not yet occurred -- specifically, the government had not yet "incurred" any costs, a prerequisite for bringing suit under CERCLA. *In re Jensen*, 127 B.R. 27 (9th B.A.P. 1991). *See* also *CMC Heartland Partners v. Union Pacific Railroad*, 3 F.2d 200, 207 (7th Cir. 1993) (claimant had sufficient knowledge for a claim to arise before the bar date for filing claims), *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 974 F.2d 775, 786 (7th Cir. 1992) (CERCLA claim existed when the claimant can tie the debtor to a known contamination and the claimant had in fact conducted tests with respect to the property), *U.S. v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990), *In re Sylvester Bros. Dev. v. Burlington N. RR.*, 133 B.R. 648 (D. Minn. 1991), *Waterville Indus. v. First Hartford Corp.*, 124 B.R. 411 (D. Me. 1991). The court in *Chateaugay*, discussed below, also incorporated a requirement of some notice into its final determination of whether the obligation was dischargeable.

5. *See*, Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 Florida L. Rev.153 (1992) for an early argument that the Bankruptcy Code requires that these issues be separated and for a framework for

of Appeals for the Third Circuit below premised its decision, in part, on the decisions of two other courts of appeals. One of those courts properly separated the timing issue from the definitional issue on the facts before it. The other cited court of appeals decision did not properly separate the two issues. The Court of Appeals for the Third Circuit likewise fails to do so.

For example, in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), discussed below, the court incorporated elements of timing into the definition of "claim." In *Chateaugay*, the court considered whether injunctions issued to the debtor to clean up contaminated sites were "claims." The court held that if the site was not currently causing pollution, then the injunction was a claim and would be discharged. However, if the injunction orders the debtor to take "action that ends or ameliorates current pollution, such an order is not a 'claim.'" Id. at 1008. In essence, the court held that cleanup obligations are not claims if cleanup will end or ameliorate current pollution. This is a timing issue, it is not part of the definitional question. The court could have decided the issue based on the timing issue. The court could have properly held that the cleanup obligation was a "claim" since CERCLA gives the government the option of ordering cleanup or cleaning up and then seeking reimbursement. Once established as a claim, the question then would be whether the claim arose pre-confirmation. In *Chateaugay*, the debtor was reorganizing and would continue to own and operate several steel plants that were located on contaminated property. As the continuing owner or operator of contaminated property, the reorganized debtor would be liable every day for cleanup under CERCLA.

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approaching these issues. *See also*, Kathryn R. Heidt, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY, Chapter 3 (1993).

Therefore, the claim would continue to "arise" every day until the property was cleaned up. The cleanup obligation would thus not be dischargeable.

In its zeal to find these hazardous sites outside the scope of the bankruptcy discharge, the court in *Chateaugay* needlessly added an element to the definition of "claim" (*i.e.*, an obligation is not a claim if it continues to cause harm). The same result could have been reached without changing the Code's definition but by simply applying the timing rules of discharge.

At least two courts of appeals have correctly separated the definitional and the timing issue. First, on virtually identical facts, the Court of Appeals for the Sixth Circuit based its decision on the definitional issue. *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988). Despite the virtual identity of facts and issues, the Court of Appeals for the Third Circuit fails to mention *Whizco*. In *Whizco*, the government did not have an alternative right to pursue a money obligation under the environmental statute concerned. Nonetheless, the court held that because the debtor would have to pay money to comply with the cleanup order, the obligation was a "claim." The conflict between the instant case and *Whizco* is patent. It is more fully discussed in Petitioner's Petition (pages 18-19).

Further, in *In re CMC Heartland Partners*, 966 F2d 1143 (7th Cir 1992) the court decided the issue of dischargeability based on the timing issue without confusing it with the definitional issue. In *CMC* the reorganized debtor continued to own the contaminated property. The court held that the government had both 1) a pre-petition claim for cleanup and 2) a post-reorganization claim against the debtor survived the debtor's bankruptcy ** discharge, since the debtor continued to own the contaminated property. As the Court of Appeals for the Seventh Circuit said: the liability "runs with the

land." Id. at 1147. That is, the environmental liability runs with the continued ownership of the contaminated land.[6]

In the instant case, the court below also confused the two issues of definition and timing. It applied cases that dealt with timing question to decide the definitional issue. The court interpreted both *Chateaugay* and *CMC Heartland* to decide whether Torwico's cleanup obligation was a "claim" within the meaning of Section 101(5)(B). As noted above, both of these cases involved the obligation to cleanup contaminated sites that the debtor *continued to own or operate* after the reorganization.[7] In the instant case, the debtor did not own the property in question and had apparently given back possession of the property to the lessor years earlier.

More importantly, the courts in both *Chateaugay* and *CMC* based their decisions on the timing issue. Both reached the correct result, despite the fact that the court in *Chateaugay* said it was deciding the definitional issues of whether the obligation was a claim. In *CMC Heartland* it was clear that the obligation was not discharged in the debtor's previous

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6. Under many environmental statutes, occupying or operating the contaminated land would also be sufficient. *See* 42 U.S.C. 9607(1).

7. In *Chateaugay* the debtor was not yet reorganized but would continue to own or operate certain contaminated properties post-reorganization. In *Chateaugay*, it is not as clear as in *CMC Heartland* that the dispute was over owned or operated properties. That is, the language used by the court in *Chateaugay* speaks in general terms about ameliorating ongoing pollution. But the facts indicate that the dispute was over properties that the debtor owned or operated.

reorganization. The debtor *continued to own the contaminated property*. Current environmental laws place cleanup responsibility on the current owner. The issue in *Chateaugay* was not so clearly framed, as noted above. Nonetheless, the real basis for the court's holding was timing: if the cleanup order would end pollution on the debtor's property it is not a claim.

The court below used these two cases to conclude that when a cleanup order will end pollution it is not a claim. A cleanup by Torwico would end the pollution. Thus, the court reasoned that the obligation was not a "claim."

The cleanup obligation below was within the plain meaning of the definition of "claim." The only question should have been when did the claim "arise?" The answer in this case is that the obligation arose pre-petition and pre-confirmation. All of the debtor's activities that gave rise to the obligation occurred in the past. The obligation therefore arose in the past. This is not like *CMC Heartland* or *Chateaugay* where the debtors continued to own or operate the contaminated property so that the obligation would arise again after the reorganization. The decision of the court below is in conflict with decisions of the Courts of Appeal for the Sixth and Second Circuits.

To summarize, the courts of appeals are divided on how they analyze whether a cleanup obligation is dischargeable. The Courts of Appeals for the Sixth and Seventh Circuits correctly respect the division between the definitional and timing issues. The Courts of Appeals for the Second and Third Circuits confuse the definitional and the timing issues. This confusion is a recurring problem in the courts that have considered whether an environmental obligation to cleanup is dischargeable in bankruptcy. The courts of appeals are divided on how to

properly apply the Bankruptcy Code to these environmental obligations. Guidance is needed from this Court.[8]

B. The cleanup obligation in this case was a "claim" because of 1) the plain meaning of the definition and 2) this Court's decision in *Ohio v. Kovacs.*

The court incorrectly interpreted the Bankruptcy Code. Its interpretation was wrong both at the technical level and at the policy level. At the technical level, the court did not apply the plain meaning of the Bankruptcy Code's definition of "claim." At the policy level (discussed below in Part I. D.) its interpretation interfered with two important bankruptcy policies: to treat similar creditors equally and to provide debtor's with a fresh start.

In the instant case the govement had a "claim" for two related reasons. First, the state had an alternative right to payment. Second, the state had a claim under this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985).

1. The State had a right to payment.

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8. Not only have the courts of appeals used conflicting analyses in deciding whether a particular environmental obligation is a "claim," the district courts and bankruptcy courts have likewise used conflicting analysis. *See e.g., In re National Gypsum Co.*, 139 B.R. 392 (N.D. Tex. 1992), *U.S. v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990). This further level of conflict and confusion over these federal issues further support the need for this Court to grant the writ of certiorari.

The obligation at issue is an order directing the debtor to cleanup property it once occupied as a lessee. On its face the order does not give the state a right to payment. Thus, the question is whether the state had a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, ..." If it did, the obligation is a "claim."

This Court has adopted a "plain meaning" approach to interpretation of the Bankruptcy Code. Rake v. Wade, __ US __, 113 S. Ct. 2187 (1993), Patterson v. Shumate, 112 S. Ct. 2242 (1992), Toibb v. Radloff, 111 S. Ct. 2197, 2199 (1991), Pa. Dep.'t Welfare v. Davenport, 110 S.Ct. at 2131 (1990), U.S. v. Ron Pair Enterprises, 489 U.S. 235 (1989). When the statute is plain, "'the sole function of the courts is to enforce it according to its terms.'" Ron Pair, 489 US at 241 (citations omitted).

The debtor breached an obligation here when it improperly disposed of hazardous substances. It breached another obligation when it failed to clean up. These obligations gave rise to two sorts of remedies, one equitable and one legal. Specifically, the state had the option to clean up the site and then to seek reimbursement from the debtor. The basis of this argument is more fully set out in Petitioner's Brief pp. 16-17. In essence, the state claims that it had no such right under the state statute pursuant to which it acted. However, the state did have an equivalent right to clean up the site under another state statute and then to seek reimbursement. The state may have also had the right to clean up under Section 104 the federal statute, the Comprehensive Environmental Response, Compensation and liability Act ("CERCLA") and then to seek

reimbursement.[9] Thus, the state had the right to an equitable remedy (to enjoin the debtor to cleanup the previously leased property and the state also had the right to clean up the property and then to seek reimbursement.

This alternative right to pursue a legal remedy makes the obligation a "claim" within the plain meaning of the Bankruptcy Code.

2. The obligation was a "claim" under this Court's decision in *Ohio v. Kovacs*.

Even if there was no alternative right to payment, the obligation is a "claim" under this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985).. In *Kovacs* an order had been entered under the state's environmental laws ordering the debtor, Mr. Kovacs, to clean up a site. The State of Ohio had no right to pursue the debtor for money in place of action. When Mr. Kovacs failed to comply, the state had a receiver appointed, pursuant to state law, who dispossessed the debtor from the property. This Court held that since the debtor was no longer in possession he could not perform cleanup but could only pay money. The obligation was therefore a "claim," was a "debt" and was dischargeable in Mr. Kovac's bankruptcy proceeding.[10]

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9. One other court has refused to rule that all such CERCLA obligation are "claims." *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). As Petitioner argues that case is distinguishable from this case since the debtor thus owned much of the property in question.

10. For an in depth discussion of *Kovacs* and its effects *see*, Kathryn R. Heidt, ENVIRONMENTAL OBLIGATIONS IN

The instant case is virtually identical to the *Kovacs* case. In both cases the debtor had probably contaminated the site in question. In both cases the debtor had been ordered to clean up the site. In both cases the debtor neither owned, operated or occupied the site in question at the time of the bankruptcy.[11] In both cases the only thing the debtor could do to clean up the site was to pay money.

BANKRUPTCY ¶ 3.03[3][c][ii] (1993) at pages 3-25 to 3-28.

11. The court below distinguished *Kovacs* by saying that Torwico could gain access to the land. 8 F.3d at 151. However, 1) it is not at all clear that Torwico had access to the land (it had left the premises, which it had leased years before) and 2) it is not clear that the debtor did not have access to the land in *Kovacs*.

The court below also distinguished *Kovacs* by saying that in *Kovacs* the state was seeking money. 8 F.3d 151. The state had not actively sought money but had admitted in oral argument at the appellate level that it would be satisfied with money. While this Court did note this admission in the *Kovacs* opinion, this Court's holding rests squarely on the fact that the debtor was not in possession of the property and could only satisfy the obligation by paying money. Further, in all likelihood, New Jersey would also be satisfied with a payment large enough to cover the cleanup. The mere fact that one state admits a willingness to take money -- even when otherwise entitled to a pure equitable remedy -- while another scrupulously avoids seeking money in any form, should not control. This would allow creditors to turn dischargeable obligations into non-dischargeable ones at their whim.

Under *Kovacs*, the obligation of the debtor in this case was a "claim." As Petitioner's brief argues, to the extent the Court of Appeals for the Third Circuit held otherwise below, its decision conflicts with a decision of this Court. (Petitioner's Brief, pages 12-17).

3. The court incorrectly applied cases involving the timing issue to decide this definitional issue.

In the instant case, the court below confused the two issues of definition and timing. It applied cases that dealt with timing question to decide the definitional issue. The court interpreted both *Chateaugay* and *CMC Heartland* to decide whether Torwico's cleanup obligation was a "claim" within the meaning of Section 101(5)(B). As noted above, (Part I.A.) both *Chateaugay* and *CMC Heartland*of these cases involved the obligation to cleanup contaminated sites that the debtor *continued to own or operate* after the reorganization.[12]

The decision of this court conflicts with other courts of appeals on the method of analyzing and decising cases on this issue.

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12. In *Chateaugay* the debtor was not yet reorganized but had sought a declaratory judgment regarding the status of the cleanup obligations once it was reorganized and would continue to own or operate certain contaminated properties post-reorganization. In *Chateaugay*, it is not as clear as in *CMC Heartland* that the dispute was over owned or operated properties. That is, the language used by the court in *Chateaugay* speaks in general terms about ameliorating ongoing pollution. But the facts indicate that the dispute was over properties that the debtor owned or operated.

C. The effect of the decision below was to ignore the real parties in interest.

The court confused the debtor with its creditors. This is not an uncommon problem in cases dealing with similar issues. The court seemed to view the dispute as a contest between the government and the debtor. The problem, of course, is that once the debtor is in bankruptcy, the real parties in interest are the creditors. The dispute below is more properly viewed as one between one creditor (the government) and the other creditors. The case thus actually presents a question about the priority of payment to creditors and should have been decided with that focus. This incorrect focus led the court below to annul a fundamental bankruptcy policy: equality for similarly situated creditors, discussed below (Part I.D.2.).

D. The decision of the court of appeals is inconsistent with established, fundamental bankruptcy policies.

1. Efficiency and fairness are fundamental bankruptcy principles on which are based the bankruptcy policies of 1) the fresh start and 2) treating similar creditors equally are based.

Bankruptcy law serves many goals. One goal is to provide debtors with a fresh start. A second is to treat similar creditors similarly. The decision of the Court of Appeals violates both of these goals.

The idea of a "fresh start" in bankruptcy is well established in our bankruptcy system. It has been recognized on

many occasions by this Court. *See, e.g., Local Loan Co. v. Hunt*, 282 U.S. 234, 244-45 (1934). To accomplish the goal of the fresh start, the debtor receives a discharge of his, her or its debts. The honest individual debtor can then continue on with life. Corporations and other non-individuals receive a discharge only if they "reorganize."[13] The idea of a "fresh start" for corporations and other non-individuals is thus more appropriately viewed as "debtor rehabilitation," one of the Congressional goals of the Bankruptcy Code. S. Rep. No. 589, 95th Cong., 2d Sess. 9, reprinted in 1978 U.S.C.C.A.N. 5787, 5795. The corporation that reorganizes can continue on with its business, which in turn means it will continue to employ employees, buy supplies, pay taxes, and be a productive corporate citizen. Reorganization serves all of the efficiency goals of the bankruptcy laws described below and it also serves to protect a variety of interests: those of employees, the community, suppliers, and other groups that are not necessarily "creditors." *See*, Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775 (1987).

Key to the individual fresh start and the corporate rehabilitation is the discharge of the debtor's past debts.

A second goal of the bankruptcy system is to assure equality among similarly situated creditors: creditors with similar claims should share equally. Under the Bankruptcy Code, unsecured creditors share on a pro-rata basis.[14] This second goal is not only fair, it is efficient. Bankruptcy is generally

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13. Section 727(a)(1) denies a discharge in a Chapter 7 case to a non-individual debtor; Section 1141(d) grants a discharge to a debtor that reorganizes.

14. *See, e.g.*, 726(b).

viewed as an efficient response to widespread default. First, bankruptcy avoids duplication of costs. If creditors were forced to pursue the debtor in state court, each creditor would spend money on court costs, attorneys fees, and related costs. In addition, the debtor may use some of the limited assets to defend these suits -- money that would otherwise be available for ultimate distribution to the creditors. Second, in some cases, keeping debtor's assets together as a whole rather than selling them piecemeal may produce a greater recovery. Bankruptcy serves to preserve this potentially greater value of the debtor's estate by keeping the assets together.

As noted above, outside of bankruptcy, creditors are normally left to their state law remedies to pursue the debtor and to attempt to recover. Under the state law system, creditors can sue the debtor for a debt owed. As each creditor recovers, it can foreclose or execute on certain property of the debtor. The state system works so long as the debtor has the ability to pay its creditors. When the debtor does not have enough assets to pay all of the creditors, the first few creditors to "win the race to the courthouse" recover, and later creditors recover nothing. Under the state law system, therefore, creditors with similar types of claims, such as general unsecured creditors, would be treated very differently -- some would be paid in full and some not at all. Bankruptcy evens out this disparity and attempts to treat all similar creditors similarly. This is fair: Two identical creditors could be equally diligent in pursuing the debtor but one might prevail over the other in the state law system simply because of the random draw of a faster judge with a fast moving docket. It is also efficient: If all unsecured creditors could bargain in advance for the distribution of assets upon a massive default by the debtor, they would agree to a pro-rata distribution. Bankruptcy accomplishes this for them. *See*, Thomas H. Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 15-17 (1986).

2. The Decision of the Court of Appeals Violates Both Principles of Bankruptcy Policy

Congress established that all "claims" that "arose" before a particular time are to be discharged in bankruptcy. In the case of the individual debtor, Congress has provided a limited set of exceptions to this rule.[15] Absent these special circumstances individual debtors in all are entitled to a discharge. Corporations that reorganize under Chapter 11 also are entitled to a discharge.

By holding that the cleanup obligation in *Torwico* was not a "claim" or a "debt," the court effectively denies debtors a discharge when they would otherwise be entitled to discharge. The decision disregards the express provisions of the Bankruptcy Code. This rule now in effect in the third circuit (cleanup obligations are not "claims") will apply to deny the individual debtor a fresh start and to deny a corporation that does reorganize the ability to effectively reorganize.[16]

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15. Under Section 523(a) child support, most taxes educational loans and certain other debts are not dischargeable. An environmental obligation may be excepted from discharge if it fits within Section 523(a)(6) (willful and malicious acts) or (a)(7) (certain fines and penalties).

Under Section 727(a) a debtor can be denied a discharge altogether for engaging in certain fraudulent acts.

16. As noted earlier, Torwico is not reorganizing. It will not receive a discharge under the Bankruptcy Code since it is not reorganizing. The rule the case establishes, however, will apply to all bankruptcies.

The decision of the Court of Appeals for the Third Circuit also violates the principle of equality among creditors. Nothing in the state environmental law gives the State of New Jersey a right to be paid before other general unsecured creditors. Congress could have provided a special priority for environmental obligations. It has provided priority for certain employee wage claims, taxes and certain other obligations.[17] It has not given priority for environmental obligations. As noted by Justice O'Conner in her concurring opinion in *Kovacs*, the state can avoid the result of *Kovacs* by enacting a lien statute. In the future the state of New Jersey could possibly gain some priority by enacting a statute granting to itself a lien for environmental obligations.[18]

There is no basis on which to give New Jersey priority here. Yet, the effect of the decision of the court of appeals is to require that the assets of the estate be used to satisfy the government's obligation first, before all other obligations. This elevates New Jersey's obligation above the others. It is unfair and inefficient because it violates the bankruptcy principle that "equality is equity."

This obligation is no different from a whole variety of non-consensual obligations. For example, a victim injured in an accident by the debtor's delivery truck before a bankruptcy is filed, or an employee injured on the job before a bankruptcy is filed, each have claims that arose in the past. Their claims will be discharged in bankruptcy. There may be a current requirement to compensate those victims under applicable tort

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17. *See, e.g.*, 11 U.S.C. 507(a)(3) and (7).

18. New Jersey does in fact have an environmental lien law in effect. It evidently does not apply to this case.

law, just as there is a current obligation to clean up the previously occupied contaminated site, but the obligation arose solely out of past activity, not current activity. Unless there is some specific provision given to us by Congress, the usual priority rules apply -- unsecured creditors are treated equally. The decision in this case violates that principle.

SUMMARY

This cases raises important questions of federal law. There is no uniformity in the courts on the question of when an environmental cleanup obligation is dischargeable in bankruptcy. The courts continue to decide these cases using very different analyses. This Court should allow the writ of certiorari to issue in order to provide the much needed guidance on this important federal question.

CONCLUSION

The writ of certiorari should be granted.

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No. 93-1187

SUPREME COURT OF THE UNITED STATES

October Term 1993

TORWICO ELECTRONICS, INC., *Petitioner*
v.
STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

Movant, Kathryn R. Heidt, requests this court to allow her to file an *amicus curiae* in support of Petitioner's "Petition for Writ of Certiorari."

Movant sought the consent of both parties to filing. Petitioner has given its consent (see attached letter), but the State of New Jersey has not.

Movant is a law professor at Wayne State University Law School in Detroit, Michigan. She has written extensively on the intersection of bankruptcy and environmental law. She

is the author of the treatise ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993). Her other publications include: *The Changing Paradigm of Debt and Obligation*, Washington University Law Quarterly (forthcoming), *Environmental Claims in Bankruptcy: A Fundamental Framework*, 44 Florida Law Review 153 (1992), *Automatic Stay in Environmental Bankruptcies*, 67 American Bankruptcy Law Journal 69 (1993), *Liability of Shareholders Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")*, 52 Ohio State Law Journal 133 (1991), *Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in a Toxic Waste Bankruptcy*, 40 Rutgers Law Review 819 (1988). Movant teaches bankruptcy law, corporate reorganizations and commercial law.

Movant has also lectured frequently on the subject of environmental obligations in bankruptcy before a wide variety of audiences including audiences made up of federal judges (the 55th Judicial Conference of the Third Circuit: Moderator and Speaker, Baltimore, Maryland, April 1993.), bankruptcy teachers and scholars (Association of American Law Schools Annual Meeting, January, 1994, The Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory:, February, 1994, Association of American Law Schools, Bankruptcy Workshop, October 1991) and bankruptcy lawyers (American Bar Association, October 1993, April 1990). Her curriculum vitae is attached.

Movant brings a perspective to these proceedings that may be broader and take into account more interests than those represented by the parties. Specifically, Movant has considered in depth the effect that a ruling in this case will have on a number of different interests. These different interests include creditors, both secured and unsecured, consensual and non-

consensual, debtors, shareholders, governments, taxpayers, and community in which debtors operate. She is familiar with the practical, conceptual, and theoretical problems that present themselves at the intersection of bankruptcy and environmental law and specifically with the problems that are present when the dischargeability of an environmental obligation is at issue -- as it is in this case. Movant believes that this broader perspective will bring to the Court's attention the effects of this Court's decision on persons and entities beyond the parties to this proceeding. Movant also believes she will cover the issues relating to bankruptcy policy in more detail than the parties to this action.

Movant, respectfully requests this Court to grant her leave to file the attached *Amicus Curiae* In Support of Petition For A Writ of Certiorari.

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March 24, 1994

Katherine Heidt
1510 Normandy Road
Ann Arbor, MI 48103

Re: Torwico Electronics, Inc. v. State of New Jersey, Department of Environmental Protection and Energy, No. 93-1187 (U.S. petition for cert. filed Jan. 24, 1994)

Dear Ms. Heidt:

Enclosed please find a copy of the petition for certiorari in the captioned case. On behalf of Petitioner Torwico Electronics, Inc., I consent to your filing an amicus brief in the case.

Sincerely,

Adam P. Strochak

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BEST AVAIL

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Telephone: (313) 995-9873

Employment

Associate Professor of Law, Wayne State University Law School, Detroit, Michigan 48202, 1985 to present (tenured)

Visiting Associate Professor of Law, New York Law School, New York, New York 10013, 1992-93

Visiting Professor of Law, University of Utrecht, Faculty of Law, Utrecht, The Netherlands, Fall 1988 (exchange program)

Associate, Duane, Morris & Heckscher, Philadelphia, Pennsylvania 19102, 1980 to 1984

Law Clerk, The Honorable John T. Patton, Cleveland, Ohio 44114, Ohio Court of Appeals, 1978 to 1980

Selected Bibliography

Books

ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (Warren Gorham & Lamont, 1993)

Articles

The Changing Paradigm of Debt and Obligation, Washington University Law Quarterly (forthcoming)

The Automatic Stay in Environmental Bankruptcies, 67 American Bankruptcy Law Journal 69 (1993)

Environmental Claims in Bankruptcy: A Fundamental Framework, 44 Florida Law Review 153 (1992)

Interest Under Section 506(b) of the Bankruptcy Code -- The Right, The Rate, and the Relationship to Bankruptcy Policy, 1991 Utah Law Review 361 (1991)

Liability of Shareholders Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 52 Ohio State Law Journal 133 (1991)

Corrective Justice From Aristotle to Second Order Liability: Who Should Pay When The Culpable Cannot? 47 Washington & Lee Law Review 347 (1990)

Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in a Toxic Waste Bankruptcy, 40 Rutgers Law Review 819 (1988)

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Selected Bibliography, Articles (continued)

Liability of Leñders for Environmental Cleanup (published by the American Bar Association for the program "Real Estate Bankruptcies in the 1990's," November 1990)

Corrective Justice: Unifying and Extending Themes of Liability (article in progress)

Use of Debtor's Tax Attributes in Bankruptcy Liquidation Proceedings (article in progress)

Short Articles

Bankruptcy and Environmental Liability: A Primer, 1 Journal of Environmental Law & Practice 39 (1994)

Counting Creditors: Further Analysis of Code Section 303(b), 1992 Norton Bankruptcy Law Advisor (November 1992)

Education

Yale Law School, New Haven, Connecticut
LL.M., May 1985

Cleveland State University College of Law, Cleveland, Ohio
J.D., *magna cum laude*, June 1978
Academic Standing: 3/156
Editor, Law Review

Pennsylvania State University, University Park, Pennsylvania
B.A., *cum laude*, Art History, 1974; Academic Standing: 3.56/4.00,
Pennsylvania State University Orchestra (violin)
Honors Program

Goethe Institute, Arolsen, West Germany, Summer 1973

Teaching Interests

Subjects taught include Commercial Law, Bankruptcy and Creditors'/Debtors' Rights, Corporate Reorganizations, Business Negotiation, Introduction to American Law; Additional interests include Corporations, Contracts, and Environmental Law

Selected Speaking Engagements and Presentations

The Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory: "The Changing Paradigm of Debt," St. Louis, Missouri, February 26, 1994

Association of American Law Schools Annual Meeting: "How Superfund Mucks-Up Your Course" (Part of an all-day Mini-workshop on "Environmental Issues Across The Curriculum"), Orlando, Florida, January 6, 1994

American Bar Association: "Keeping the Bulls Out of the China Shop" (at the National Conference of Bankruptcy Judges) Orlando, Florida, October 19, 1993

Selected Speaking Engagements and Presentations (continued)

55th Judicial Conference of the Third Circuit: Moderator and Speaker, "Resolving Environmental Claims In Bankruptcy," Baltimore, Maryland, April 1993

American Bar Association: Moderator and Program Coordinator, "Chapter 11: Current Controversies, Future Fixes," (at the National Conference of Bankruptcy Judges) San Antonio, Texas, October 17, 1992

University of Texas Law School, 10th Annual Bankruptcy Conference: "The Automatic Stay In Environmental Bankruptcies," Austin, Texas, November 16, 1992

Eastern District of Pennsylvania Bankruptcy Conference:

January 29, 1994: "Confirmation and Disclosure in Chapter 11 Reorganizations"
January 30, 1993: "Ethical Issues in Bankruptcy: Pre-bankruptcy Planning"
January 25, 1992: "Environmental Obligations in Bankruptcy" January 1992

Association of American Law Schools, Bankruptcy Workshop, Faculty Member, "Bankruptcy and Environmental Law," Washington D.C., October 1991

American Bar Association, Moderator, "Recent Decisions Involving Environmental Claims in Bankruptcy," San Francisco, California, October 1991 (at the National Conference of Bankruptcy Judges)

American Bar Association, Program Coordinator, "Real Estate Bankruptcies in the 1990's," Chicago, Illinois, November 1990 (at the National Conference of Bankruptcy Judges)

American Bar Association, "Current Developments," Boston, Massachusetts, April 1990

Other Scholarly Activities and Public Service

Chair, Association of American Law Schools, Debtor-Creditor Section (1994)

Chair, Programs and Publications Subcommittee, Business Bankruptcy Committee, American Bar Association, Business Law Section (October 1993 to October 1995)

Editorial Peer Reviewer for THE BUSINESS LAWYER

Editorial Peer Reviewer for the LAND USE AND ENVIRONMENT LAW REVIEW

Member, Board of Editors for the JOURNAL OF BANKRUPTCY LAW AND PRACTICE

Interview by The Washington University School of Law Environmental Law Society. The interview appears at: 2 ELS Reporter 32 (Fall 1992)

Guest, New York cable TV program "Lawline." This half-hour show aired in the New York/New Jersey area during the month of February, 1993.

Other Scholarly Activities and Public Service (continued)

Represented a United States District Judge in opposing a petition for certiorari before the United States Supreme Court regarding attorney contempt in the federal courts (Winter 1986)

Volunteer Lawyers Action Program, Philadelphia Bar Association, (represented indigent clients in bankruptcy proceedings) (1981-1983)

Testified on the proposed federal Bankruptcy Rules and prepared a written statement on those proposed rules (1982)

Reported to the Bankruptcy Committee of the Philadelphia Bar Association on portions of the proposed Bankruptcy Rules (1982)

University and Law School Service

Academic Senate, Law School Representative (1989-1992)

President's Commission on the Status of Women, Chair (1991-92), Member (1989-92)

Various Law School Committees including Personnel/Faculty Recruitment (1989-1990 and 1993-94), Career Services (Chair 1993-94), Programs (1991-92), Placement (1990-91), Admissions (1986-1989), Long Range Planning (1986-87), Budget (1986-87), Ad Hoc Computer Committee (1985-86)

Faculty Advisor, Student team for the American Bar Association's negotiation competition (Fall 1993)

Bar Admissions Ohio, 1978; Pennsylvania, 1980

Research Awards

Selected as the Senior Nominee by Wayne State University for the 1992 National Endowment for the Humanities summer stipend

Summer Research Grant Recipient, Wayne State University (summers 1985 through 93)

References Available Upon Request